

CHELLAPPAH v. OFFICIAL ASSIGNEE

[O.C.J. (Raja Azlan Shah J.) January 21, 1970]

[Kuala Lumpur — Originating Motion No. 3 of 1969]

*Bankruptcy — Claim on bankrupt's estate — Unlicensed moneylender — Whether claim enforceable — Moneylenders Ordinance, 1951, s. 15.**Moneylenders — Unlicensed moneylender — Evidence of subsequent loans — Whether relevant and admissible as showing lender a moneylender at time of transaction — Moneylenders Ordinance, 1951.*

The applicant as a creditor of a bankrupt sought to set aside the respondent's rejection of his proof of a debt amounting to \$1,565 on the ground that he was an unlicensed moneylender and therefore his claim was unenforceable under section 15 of the Moneylenders Ordinance. The respondent had evidence that the applicant had on two subsequent occasions made loans to two different persons at interest.

Held, dismissing the application: (1) loans made during a reasonable period immediately preceding the transaction in question are relevant and admissible;

(2) the court is not prevented from taking into consideration loans made after the date of the relevant transaction in order to establish the required regularity, continuity and system in moneylending business;

(3) evidence of subsequent loan is very material in order to show that a person was a moneylender at the time of a particular transaction, and it was perfectly proper for the respondent in this case to take into account those two subsequent loans to show that the applicant was an unlicensed moneylender.

Cases referred to:-

(1) *Nash v. Layton* [1911] 2 Ch. 71.

(2) *Marshall v. Goulston Discount (Northern) Ltd.* [1967] Ch. 72.

ORIGINATION MOTION.

G. Vadiveloo for the applicant.

Chong Hee Choy for the Official Assignee.

Raja Azlan Shah J.: The applicant as a creditor of a bankrupt lodged with the Official Assignee a proof of debt amounting to \$1,565 against the bankrupt's estate. The claim is based on an 'on demand' note dated 3rd May 1956 for \$1,000 bearing interest at 12% per annum. The Official Assignee rejected the said proof on the ground that the creditor was an unlicensed moneylender and therefore his claim was unenforceable under section 15 of the Moneylenders Ordinance. Subsequent investigations by the Official Assignee proved that the applicant had on two subsequent occasions made loans of \$2,600 and \$347 to two different persons at interest of 18 and 12% per annum respectively.

This is an application to set aside the decision of the Official Assignee. It is said on his behalf that respondent erred in taking into consideration those two subsequent loans in order to prove the required regularity, continuity and system which is characteristic of carrying on a moneylending business.

It is established law that loans made during a reasonable period immediately preceding the transaction in question are relevant and admissible: see *Nash v. Layton*.⁽¹⁾ It seems to me that there is nothing in *Nash v. Layton* which prevents the court from taking

A into consideration loans made after the date of the relevant transaction in order to establish the required regularity, continuity and system in moneylending business. In fact that point was not argued or discussed in that case. There is the authority of *Marshall v. Goulston Discount (Northern) Ltd.*⁽²⁾ for the proposition that evidence of subsequent loan is very material in order to show that a person was a moneylender at the time of a particular transaction. In the light of this authority, it was perfectly proper for the respondent to take into account those two subsequent loans to show that the applicant was an unlicensed moneylender on 3rd May 1956.

C The application is dismissed with costs.

Application dismissed.

Solicitors: D. P. Xavier & Co.

JOHANNES KOPLAN v. AW CHEN

[F.C. (Ong C.J. (Malaya), Gill F.J. & Abdul Aziz J.)

January 26, 1970]

[Ipoh — Federal Court Civil Appeal No. X.65 of 1969]

Road Traffic — Third party insurance — Running down action — Whereabouts of insured unknown — Service of writ could not be effected.

Practice and Procedure — Running-down action — Order for substituted service — Appeal by insurers in own name to have order set aside — Insurers not party to action — Policy giving insurers control of proceedings.

The plaintiff was a passenger in a motor-car on May 16, 1965 when another vehicle owned and driven by the defendant, an Austrian engineer on a temporary assignment in Perak, ran into it from behind, causing the plaintiff serious bodily injury. Some twelve months later, when the plaintiff's solicitors were instructed to issue writ in the action, it was discovered that the defendant had left Malaya on August 24, 1965 with no intention of returning. Several attempts were made to effect service on the defendant but without any success. Substituted service was allowed by the court and eventually on May 21, 1968 interlocutory judgment was signed against the defendant. On May 21, 1968 the plaintiff applied for assessment of damages on a date to be fixed by the court. It was at this stage that the National Insurance Co. Ltd. the insurers of the defendant's vehicle, intervened. They applied on July 20, 1968 for the order of substituted service and all subsequent proceedings to be set aside, on a variety of technical grounds, of which the principal one was that there was no possibility of the notice having been brought to the defendant's attention. The judge did not agree and dismissed the application with costs ([1969] 2 M.L.J. 190). Against that order the insurers appealed.

At the hearing of the appeal, on the court's suggestion, counsel on both sides readily agreed to an order, by consent, that the interlocutory judgment be set aside and the insurers be allowed to appear and defend the action in the name of the defendant, they paying to the plaintiff all costs thrown away by reason of their default.

Per Curiam: "In making the suggestion that we did, we might mention that we had in mind practical considerations. Legal technicalities which stand in the way of any aggrieved person seeking and obtaining his remedy in court should not be allowed to prevail so as to frustrate any just claim. Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against their insured. The

negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended. If insurers 'have to fight the action without their most essential witness, that would be their misfortune, and not the plaintiff's fault'."

Cases referred to:-

- (1) *Murfin v. Ashbridge* [1941] 1 All E.R. 231, 232.
- (2) *In re Urquhart* (1890) 24 Q.B.D. 723, 726.
- (3) *Watt v. Barnett* (1878) 3 Q.B.D. 183.
- (4) *Gurner v. Circuit* [1968] 2 Q.B. 587, 597.
- (5) *Fire Auto & Marine Insurance Co. Ltd. v. Greene* [1964] 2 Q.B. 687.

FEDERAL COURT.

P. P. Dharmananda for the appellant.

N. H. Chun for the respondent.

Cur. Adv. Vult.

Ong C.J.: This appeal illustrates the difficulties which all too frequently confront the person injured in a road accident when the defendant has left the country or his whereabouts are unknown. In this case, fortunately for the plaintiff, the solicitors instructed by him have shown commendable industry and tenacity, with the result that, should he succeed in the action, he would not be balked of the compensation due to him.

The plaintiff was a passenger in a motor-car on May 16, 1965 when another vehicle owned and driven by the defendant, an Austrian engineer on a temporary assignment in Perak, ran into it from behind, causing the plaintiff serious bodily injury. Some twelve months later, when the plaintiff's solicitors were instructed to issue writ in the action, it was discovered that the defendant had left Malaya on August 24, 1965 with no intention of returning. He had left with his former employers an address at Steiermark in Austria where they believed he was residing. On July 20, 1966 the senior assistant registrar of the High Court made an order giving the plaintiff leave to serve notice of the writ on the defendant at the designated address "or elsewhere in Austria". On December 23, 1966 the documents were returned by the Principal Registry at Kuala Lumpur with a note to the solicitors that, according to the Austrian Embassy in Bangkok, service could not be effected on the defendant at the address given as he had left without revealing where he could be found. The next step then taken on behalf of the plaintiff was to apply for the notice of issue of the writ to be served by substituted service. The writ, which was due to expire on August 5, 1967, was renewed for a further 6 months and on August 23, 1967 an order for substituted service was made for the required notice to be published in the *Wiener Zeitung* and posting thereof both in the Town Hall at Steiermark and on the notice-board of the High Court at Ipoh, as well as publication in the *Straits Times*. It was learnt subsequently from a legal practitioner in Vienna, whose assistance was sought by the plaintiff's solicitors, that posting on the official notice-board in the Austrian city was not possible as directed by the order of court dated August 23, 1967. An amendment of the said order was accordingly applied for and obtained on

A March 23, 1968. Proof of service in terms of the said order having been given in due course and the defendant having failed to enter an appearance there-to, interlocutory judgment was signed on April 18, 1968 against the defendant for damages to be assessed. On May 21, 1968 the plaintiff applied for such assessment on a date to be fixed by the court.

B It was only at this late stage that the National Insurance Company Limited, the insurers of the defendant's vehicle, intervened. They applied on July 20, 1968 by summons in chambers for the order of substituted service and all subsequent proceedings to be set aside, on a variety of technical grounds, of which the principal one was that there was no possibility of the notice being brought to the defendant's attention. C The judge did not agree and dismissed the application with costs. Against that order the insurers appealed.

At the hearing before this court counsel for the insurers admitted that they were given notice of the plaintiff's claim, pursuant to the provisions of section 80 (2) of the Road Traffic Ordinance. In fairness to counsel we should add that he was not advising the company to sit on their hands, as they did, presumably in the hope that the plaintiff would abandon his claim in the face of seemingly insuperable difficulties. D Counsel conceded that, in the circumstances, the insurers should have taken appropriate steps earlier to ensure that the claim would be heard on its merits, instead of succeeding by default. In view of this the question raised in this appeal presented no problem and, on the court's suggestion, counsel on both sides readily agreed to an order, by consent, that the interlocutory judgment be set aside and the insurers be allowed to appear and defend the action in the name of the defendant, they paying to the plaintiff all costs thrown away by reason of their default, which was agreed at \$750, in any event. E F

In making the suggestion that we did, we might mention that we had in mind practical considerations. Legal technicalities which stand in the way of any aggrieved person seeking and obtaining his remedy in court should not be allowed to prevail so as to frustrate any just claim. G Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against their insured. The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended. If insurers "have to fight the action without their most essential witness, that would be their misfortune, and not the plaintiff's fault": so said Sir Wilfred Greene M.R. in *Murfin v. Ashbridge*.⁽¹⁾ The question of substituted service must be considered in this light. We accordingly thought it right to follow the decision in *In re Urquhart*,⁽²⁾ in which Lopes L.J. said:—

H I "Much to my surprise, it has been contended that an order for substituted service cannot be made when a debtor has gone out of this country to avoid service. In *Watt v. Barnett*,⁽³⁾ Mellor J., said (at p. 186): 'I think that the object of the 2nd rule of Order IX was to obviate the difficulties that the plaintiff might be exposed to by reason of a defendant's going abroad and keeping abroad, and it being impossible to effect personal service, and to prevent the plaintiff's

right being entirely defeated by reason of these difficulties. It was intended, in my opinion, in such cases to enable the court to order substituted service, and that when such substituted service is directed it should have all the effects of personal service.' Those observations of Mellor J. have been over and over again approved, and I think the present case is well within them."

In the recent case of *Gurtner v. Circuit*⁽⁴⁾ the defendant had emigrated to Canada and could not be traced. The plaintiff's solicitors wrote to the Motor Insurers' Bureau seeking their help to trace the defendant's insurers and the Bureau asked the Royal Insurance Company to act for them, but neither the plaintiff nor the insurance company were able to trace the name of the insurers or the whereabouts of the defendant. The plaintiff in due course applied for an order of substituted service on the defendant "at c/o The Royal Insurance Co. Ltd., 24/28 Lombard Street, London E.C.3". The Bureau then applied by summons to be added as defendants to the plaintiff's action and to have set aside the order for substituted service of the writ. They failed for the reason thus stated by Lord Denning M.R. at p. 597:—

"In my opinion, therefore, the order for substituted service made on June 22, 1967, could be set aside if it would serve any useful purpose. If there were any possibility of tracing the defendant in Canada, substituted service should be ordered by advertisement and so forth. But that seems to be a useless procedure here. The practical course is to allow the order for substituted service to stand without incurring any further costs: and to allow the service to stand."

There was, of course, a practical solution which the court unanimously held acceptable. As Diplock L.J. (as he then was) said, at p. 602:—

"Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely 'adjudicated upon' unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard. In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third-party liability policy give to the insurer a contractual right to conduct the defence of the running-down action in the name of the assured. But as I read his judgment in the *Fire Auto & Marine* case,⁽⁵⁾ John Stephenson J. would have allowed an ordinary insurer to be added as a party to a running-down action if the policy of insurance did not contain such a term. And this, I think, would be right.

I do not think the rules of natural justice depend upon a technicality as to the procedure by which the liability of a person who is bound to satisfy the judgment obtained by the plaintiff in the running-down action is enforceable. So long as it is legally enforceable against that person either directly by the plaintiff or indirectly by the Minister for the plaintiff's benefit under such a contract as exists in the present case, the court has jurisdiction to add that person as a party and ought normally to exercise its discretion by granting his application to be added. I think, therefore, that the bureau is entitled to be added as a party to the present action."

We trust that the principles applied in the cases above cited will throw a guiding light to victims of road accidents who find themselves baffled by the disappearance of the defendant.

Order accordingly.

Solicitors: *Dharmananda & Co.; Cheang Lee & Ong.*

A COMMISSIONER FOR RELIGIOUS AFFAIRS, TRENGGANU & ORS. v. TENGKU MARIAM BINTI TENGKU SRI WA RAJA & ANOR.

[F.C. (Azmi L.P., Suffian & Ali F.J.) February 9, 1970]

[Kuala Trengganu — Federal Court Civil Appeal No. X.13 of 1969]

Muslim Law — Wakf — Validity of — Estoppel — Fetua issued by Mufti — Effect of — Trengganu Administration of Islamic Law Enactment, 1955, ss. 20 & 21.

Estoppel — Evidence Ordinance, 1950, s. 115 — Suits between the representor's representatives and the representee's representatives.

This was an appeal from the judgment of Wan Suleiman J. ([1969] 1 M.L.J. 110) in which he declared the *wakf* to be invalid as (a) it was essentially for the benefit of Tengku Chik's family and the gift to charity was illusory and (b) it contained a power of revocation. It appeared that the parties had agreed to refer the document of *wakf* to and abide by the decision of the Mufti or the *Majlis Alim Ulama*. This was done and the Mufti had given a *fetua* that the *wakf* was valid.

Held, allowing the appeal: (1) (by Azmi L.P. and Suffian F.J.) although the *wakf* was invalid, the parties were estopped from challenging its validity as they or their predecessors had agreed to abide by the decision of the Mufti in this case;

(2) (by Ali F.J.) the respondents in this case were precluded from challenging the validity of the *wakf* as an authoritative ruling binding on them had been given by the Mufti and therefore the trial court had in the circumstances no jurisdiction to hear the case.

Cases referred to:—

- (1) *Abdul Fata Mohamed Ishak v. Russomoy Dhur Chowdhry* (1894) 22 L.A. 76.
- (2) *Fatuma binti Mohamed v. Mohamed bin Salim* [1952] A.C. 1.
- (3) *Talibu bin Mwijaka v. Executors of Siwa Haji Decd.* [1907] 3 E.A.L.R. 33.
- (4) *Said bin Mohammad v. Wakf Commissioner* (1946) 13 E.A.C.A. 32.
- (5) *Abdul Satar & Ors. v. Advocate-General of Bombay* A.I.R. 1933 Bom. 87.
- (6) *Sarat Chunder Dey v. Gopal Chunder Laha* 19 I.A. 203; I.L.R. 20 Cal. 296.
- (7) *Cairncross v. Lorimer* (1860) 3 Macq. 829.
- (8) *Raja of Deo v. Abdullah* (1918) 45 I.A. 97; I.L.R. 45 Cal. 909; [1918] M.W.N. 406.
- (9) *Guaranty Trust Company of New York v. Hannay & Co.* [1915] 2 K.B. 536.
- (10) *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18.
- (11) *Ramah binti Ta'at v. Laton binti Malim Sutan* (1927) 6 F.M.S.L.R. 128.
- (12) *Parimah binti Hanis v. Haji Ismail bin Tamin* [1939] M.L.J. 134.
- (13) *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government & Ors.* [1960] A.C. 260, 286.

I FEDERAL COURT.

Edward Lim for the 1st and 4th appellants.

S. T. Chung and Eugene Phoa for the 2nd appellant.

H. L. Wrigglesworth and Edward Lim for the 3rd appellant.